QUESTIONS PRESENTED

1. Whether the Court of Appeal below in employing settled rules of law to hold the rice in question subject to a general non-discriminatory ad valorem property tax has decided Federal questions of substance not heretofore determined by this Court.

2. Whether the probability that such questions were not decided in accordance with applicable decisions of this Court requires granting a Writ of Certiorari.

3. Whether the decision below is so inconsistent with the decisions of other states so as to necessitate granting a Writ of Certiorari.

STATEMENT OF THE CASE

I. Nature of the Case.

This is an action filed by the plaintiff-petitioner Rice Growers' Association of California (hereinafter "RGA") against the defendant-respondent, County of Yolo (hereinafter "County"), for the recovery of $89,993.96. (C.T. 7). That amount was paid by RGA to County under protest in writing specifying the sole ground on which the claim is founded is that the "entire assessment is void as the goods were exempt from local property taxation, being goods in export and exempt under Article I, §10 of the United States Constitution." (C.T. 11). The payment under protest was pursuant to the County's assessment on property belonging to RGA. (C.T. 16-17). All of the property

involved consists of rice which the County denies had assumed the status of an "export" at the time of said assessments and as such were subject to local ad valorem property taxation. (C.T. 12-13).

II. Statement of Facts.

This case was tried in the Superior Court for the City and County of San Francisco upon a joint and agreed stipulation of facts (C.T. 15-17), which are fully set forth in the Clerk's Transcript and hence need not be stated here in great detail. The only issue before the Superior Court was whether the rice which was the subject matter of the contested assessments had assumed the status of "export".

None of the rice had commenced export movement or had been committed thereto, but on the contrary was stored in bulk in certain warehouses located in the County of Yolo on lien date, the first Monday of March, 1966 (12:00 o'clock noon, March 7, 1966). (C.T. 16:1-13). All the rice was grown and processed within the State of California and was stored and shipped in bulk. (C.T. 17:14-16).

The rice can be divided into the following six (6) categories (C.T. 17:22-18:14):

Assessment No.		Description & Location Name of Ship	No. of Pounds	Tax Levied and Paid
1.	2596	Pearl Milled Rice in bins at the Port of Sacramento (Rice Queen)	9,054,020	$15,618.15
2.	5911	Calrose Milled Rice in bins at the Port of Sacramento (Polk)	405,325	699.48
3.	5915	Calrose Brown Rice in bins at the Port of Sacramento (Belnor)	13,876,400	20,944.95
4.	5914	Calrose Brown Rice in separate bins at plaintiff's West Sacramento warehouse (Belnor)	2,499,300	3,934.41
5.	5913	Pearl Brown Rice in separate bins at plaintiff's West Sacramento warehouse (Hope Peake/Avenir)	2,137,100	3,364.13
6.	5912	Pearl Paddy Rice unmilled located at plaintiff's West Sacramento mill (Hope Peake/Avenir)	42,090,700	45,432.84
				$ 89,993.96

Category (1) rice consisted of milled rice in storage at the Port of Sacramento which was used to fill a sale to Rice Growers' Association of California, Inc., Catano, Puerto Rico, a wholly owned subsidiary of respondent, pursuant to a contract consummated on or about March 1, 1966. (C.T. 18:18-22). On lien date it was awaiting ocean transportation in a vessel to be designated by the purchaser on or before lien date. (C.T. 20:1-3). All of this rice was in fact shipped to Puerto Rico aboard the SS. Rice Queen

which departed Sacramento on or about March 30, 1966. In addition to Category (1) rice, this vessel carried other rice sold by plaintiff to Puerto Rico which is not involved in this litigation. (CT 20:9-14).

Category (2) rice was milled and processed by respondent at its mills located at Biggs and West Sacramento, California. It was delivered to the Port of Sacramento originally for shipment to Okinawa aboard the SS. Ainfield, which sailed on March 1, 1966. The Category (2) rice here involved was not loaded to the vessel at that time because of the ship's limitations. (C.T. 20:15-21). On March 7, 1966, prior to 12:00 o'clock noon, a contract was entered into with Okinawan Rice Importers' Association for the sale of a quantity of rice f.o.b. Sacramento. Category (2) rice formed a portion of the rice used to fill this sale by export aboard the SS. Polk on March 20, 1966. (C.T. 21:12).

Category (3) rice consisted of brown rice in storage at the Port of Sacramento. It, together with that of Categories (4), (5) and (6), formed a portion of that used to fill a sale to Japanese Rice Importers' Association which was filled by the entire cargo of a voyage of each of three ships. (C.T. 19:3-8). The sale was f.o.b. Sacramento, and rice in this category was exported on the M.S. Belnor which departed Sacramento on or about March 31, 1966. (C.T. 22:2, 9-10).

Category (4) rice, Calrose Brown, and Category (5), Pearl Brown, were in storage in bins at respondent's warehouse in West Sacramento (C.T. 18:5-

11) and were used in partial fulfillment of the same sale as Category (3) rice. Category (4) rice made up a part of the shipment carried on the M.S. Belnor which departed Sacramento on or about March 31, 1966. (C.T. 23:4-7). Category (5) rice was shipped on the M.V. Hope Peake and M.V. Avenir which departed Sacramento on or about April 9 and May 5, 1966, respectively. (C.T. 24:7-11).

Category (6) rice was also used to fill the same Japanese sale as Categories (3) through (5). This rice was in its paddy state on lien date and was located in a storage warehouse at respondent's West Sacramento mill. Subsequent to the lien date, it was milled and was exported to Japan as a part of respondent's pearl rice which was shipped on the M.V. Hope Peake and M.V. Avenir. (C.T. 24:14-21).

The sales contracts contained some common features. Each of the contracts for the sale of respondent's rice, provided for a sale f.o.b. Sacramento. (C.T. 20:4; 21:3; 22:2). Negotiable bills of lading were issued by or on behalf of the ocean carriers to the respondent for the rice delivered in fulfillment of each of the mentioned orders and payment for such rice was made by or on behalf of the buyer upon delivery of the negotiable bills of lading and other documents. (C.T. 19:9-13).

The sales of the Okinawan and Japanese rice provided for a variance of 10% more or less of the quantity sold. This gives the ship owner the option of taking 10% more or less depending upon his space availability. (C.T. 19:14-17).

Respondent's sales to Okinawa and Japan were made in the name of the California Rice Export Corporation, a corporation organized and existing under the Export Trade Act, also known as the Webb-Pomerene Act. Respondent, a member of that corporation, generally supplies approximately 50% of the rice required by each order. (C.T. 24:20-25) The rice carried by the Belnor not supplied by respondent was loaded pursuant to this sales contract at Stockton, California. (C.T. 9:11).

Rice in Category (1) was the same general type of rice sold in the continental United States but is milled differently to meet the requirements of sale in Puerto Rico. (C.T. 26:13-16). It was U. S. No. 1 Pearl Rice, which rice is milled lighter than Pearl Rice sold by respondent to Hawaii and is milled harder than that sold by respondent in the continental United States. (C.T. 20:5-8). The rice of Categories (2), (3), (4) and (5) was milled to the specifications of the purchasers thereof and was not marketable domestically without remilling. Rice of the kinds and varieties of the subject rice can be further processed so as to meet the demands of the domestic market, but it is not economically feasible to do so. (C.T. 25:6-14).

The rice in Category (6) was in its paddy state on lien date. It was of a content known by respondent to be capable when milled of fulfilling the requirements of the purchaser. (C.T. 4:14-16). It was also capable of further processing so as to meet the demands of the domestic market. (C.T. 25:11-13).

Pursuant to respondent's agreement with the government, it received a subsidy of rice exports; however, if it failed to export the rice it would have lost the subsidy and would have incurred a penalty sanction. (C.T. 27:2-7).

Pursuant to the stipulated facts and the written and oral arguments presented, the Superior Court on April 16, 1969, ruled in favor of the plaintiff, RGA.

III. Decision of the Court of Appeal.

The decision and opinion of the Court of Appeal properly and correctly reversed the erroneous trial court ruling. The effect of that decision and ruling is to reaffirm the traditional and correct approach that both certainty and motion—or commitment thereto—are necessary to a finding that goods are export; further, they must exist concurrently.

Before analyzing the issues in light of the traditional test, the Court of Appeal called attention to the well known policy effectuated by the Import-Export Clauses of the Federal Constitution and their history. Attention was also called to the careful balancing of federal and state interest by this Court, and the Court of Appeal approved respondent's plea against expansion of the definition of export from its well-established connotation so as to further impair the financies of maritime states and local government. The Court declared that the local taxpayer is not compelled to subsidize exports as a matter of policy. (Opinion, Appendix to Petition for a Writ of Certiorari ("Appendix") pp. v and vi, 17 C.A.3d at pp. 232, 233).

After making these policy declarations, the District Court of Appeal proceeded properly to apply the established tests determining when property becomes subject to a special constitutional privilege that carries out a policy of balancing the duty of every taxpayer to make his fair contribution to local government against the risk of discrimination or undue or multiple burdens. The test requires concurrent existence of both certainty and motion—or commitment thereto. (Opinion, Appendix page vi, 17 C.A.3d at page 233). The requirement is dual, mere certainty does not suffice. (Opinion, Appendix Footnote 2 at page xi, *Hugo Neu Corp. v. County of Los Angeles,* 7 C.A.3d 21, 24 (1970)).

The Court of Appeal correctly assumed that commitment to movement is more than mere restatement of the requirement of certainty of export, and on the basis of *Empresa Siderurgica, S.A. v. Merced County,* 337 U.S. 154 (1949), rejected petitioner's assertion that the facts tending to show certainty also showed commitment to export movement. Acceptance of such an assertion would destroy the duality of the test inasmuch as commitment to movement measured by commercial certainty is no different from certainty of export. The Court properly rejected the assertion.

The petitioner in its discussion of the decision of the Court of Appeal on pages 8, 9 and 10 of its Petition renews its assertion by calling attention to the portion of *Richfield Oil Corp. v. State Board of Equalization,* 329 U.S. 69, at page 82 (1946) that was quoted by the Court of Appeal in its opinion at page ix. Petitioner,

however, distorts the meaning of the quoted language by failing to complete the passage which continues as follows:

> "The present case is an excellent illustration. The foreign purchaser furnished the ship to carry the oil abroad. Delivery was made into the hold of the vessel from the vendor's tanks located at the dock. *That delivery marked the commencement of the movement of the oil abroad. ... The means of shipment* are unimportant so long as the certainty of the foreign destination is plain."

The thrust of *Richfield Oil* is that delivery into the oceangoing vessel from the dockside tanks marked the commencement of the movement of oil abroad. Indeed, mere loading of the oil into the hold of the vessel did not mark the commencement of the journey in a physical sense inasmuch as such journey out of the country would not begin until the ship left the dock. So long as the ship is motionless and tied to the dock, there is no movement, and, in the *Richfield* case where the ship was owned by the purchaser, it was free to pump the oil back out of the ship and divert it into the domestic market. Indeed, this was the argument of the taxing agency. The Court answered the argument by holding that delivery to the vessel constituted sufficient commitment to export movement so as to mark the commencement of the journey.

The Court below in the present case correctly concluded that *Richfield,* contrary to petitioner's contentions, did not abandon the established requirement of movement out of the country, substituting a test of "certainty of export", in defining exports. Inasmuch

as the rice in the instant case had not been loaded into the oceangoing vessel, the Court below correctly concluded that it was not an export.

Very properly, the Court below then continued to focus on eleven separate considerations tending to indicate the certainty of export but concluded that none of the considerations entitled petitioner's rice to export status inasmuch as it had not been committed to export movement in the manner required by *Richfield*.

In doing so, the Court below reaffirmed the traditional approach and the very careful balancing of federal and state interests which is indeed crucial in the present parlous conditions affecting state and local finances. This traditional balancing limits the nature of the constitutional protection to a shield against discrimination and prevents it from being thrust as a sword for special privilege.

SUMMARY OF THE ARGUMENT

Respondent opposes the Petition for a Writ of Certiorari on the basis of the settled rules that impose a dual test for export status. This test requires both certainty and motion or commitment thereto. Where, as in this case, the property when taxed was not in motion, the question is whether commitment to motion requires physical movement or merely a pledge to do so in the future. The law clearly imposes the requirement of physical movement, for to do otherwise would destroy the duality of the test. Under the circumstances in this case it is delivery to the export

vessel that marked the commencement of physical movement abroad and the Court below properly sustained the Respondent's general non-discriminatory ad valorem property tax.

These rules are expressions of a fine balance between federal and state interests. The federal interest is that of protection against discriminatory taxation. This interest dates from the foundation of our republic and is reflected in the Constitutional Convention of 1787. The state interest is its need fairly to tax property within its borders so that all taxpayers bear a non-discriminatory share of the cost of local government.

Petitioner, on the other hand, urges a very different approach. It would discard the time-honored rules for the unitary test of whether the property is irrevocably committed to the process of exportation, meaning commitment in the figurative sence of a promise or pledge for the future rather than physical movement. The difficulty with this test is that it would expand the scope of immunity far beyond the narrow limits of the underlying policies. The fine balance of federal and state interests concerned with discrimination against foreign trade would be upset so as to lead back to every forest, mine and factory in the land. Such an example is found in the instant case where petitioner seeks immunity for paddy rice, a raw material in storage awaiting manufacture as well as for processed rice in storage at the mills and at a port warehouse awaiting delivery to an export vessel. Petitioner's justification is encouragement of foreign commerce and the balance of payments, yet it cites no authority, and, indeed, there is none for the proposition.

In addition, Petitioner urges trade with Puerto Rico to be export trade. This is not the case.

As appears below, however, Petitioner's arguments have been rejected by this Court in a number of leading decisions. There is neither novelty nor substance to warrant granting certiorari; the decision below is quite in accord with the applicable decisions of this Court. Finally, there is no inconsistency in state court decisions so as to require further pronouncements by this Court. For these reasons Respondent respectfully prays that the petition for certiorari be denied.

ARGUMENT

I

THE SETTLED NATURE OF THE RULES OF LAW AND THEIR CORRECT APPLICATION BELOW VITIATE PETITIONER'S CLAIMS OF SUBSTANCE AND NOVELTY FOR THE FEDERAL ISSUES.

A. Both certainty and motion or commitment thereto are necessary to a finding that goods are exports.

Petitioner at page 14 of its Petition for a Writ of Certiorari ("Petition") asserts that the standard for determining immunity is whether, considering all relevant factors, there is certainty that the goods are presently for exportation. This is not the case. The great weight and duration of the authorities against Petitioner vitiate the novelty or substance of the argument.

This very argument was made and rejected in *Hugo Neu Corp. v. County of Los Angeles,* 7 C.A.3d 21 (1970), where the Court firmly declared at page 24 as follows:

> "It will not suffice that a journey to a foreign land is absolutely certain as of the date the tax is levied. Both certainty and motion—or commitment thereto—are necessary to a finding that goods are exports; further, they must exist concurrently."

This rule is based upon that declared by an early case of this Court, *Coe v. Errol,* 116 U.S. 517, 527, 29 L.Ed. 715, 718 (1886), which was expressly employed by the two latest decisions of this Court determining when property becomes an export, *Richfield Oil Co. v. State Board of Equalization,* 329 U.S. 69, 91 L.Ed. 80, 91 (1946) and *Empresa Siderurgica, S.A. v. Merced,* 337 U.S. 154, 156, 93 L.Ed. 1276, 1279 (1949) as follows:

> "Goods do not cease to be a part of the general mass of property in the State subject as such to its jurisdiction and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey."

As this Court observed in *Canton R. Co. v. Rogan,* 340 U.S. 511, 515, 95 L.Ed. 488, 493 (1951), before concluding that activities in the conduct of a maritime terminal more remote than loading for export do not commence the movement of the commodities abroad and therefore are not a part of the export process:

> "The broader definition which appellant tenders distorts the ordinary meaning of the terms. It would lead back to every forest, mine, and factory in the land and create a zone of tax immunity never before imagined."

Indeed petitioner in this case would create a zone of tax immunity leading back to the factory that includes milled rice stored both at the terminal and at the factory and even paddy rice, the raw material awaiting manufacture at the factory.

B. Commitment to motion requires physical movement, not merely a pledge to do so; otherwise, the duality of the test is destroyed.

Petitioner urges that commitment to movement is satisfied by certainty of future movement. (Petition, pages 9, 10, 12-18). This is not the case.

Petitioner's argument fails for five reasons. They are falseness of the premise, rejection by this Court, cases requiring movement, meaning of "commitment", and duality of the test.

False Premise. The argument is based upon language from *Richfield, supra,* 329 U.S. at page 82, 91 L.Ed. at page 92, which disavows the necessity of delivery to a common carrier where the vessel is owned by a foreign buyer and which was incompletely quoted by petitioner at page 9 of its Petition. The Court in *Hugo Neu, supra,* 7 C.A.3d at page 28, answered the argument as follows:

> "Richfield however did not dispense with the requirement of physical movement into the export stream. It merely held that there are ways other than delivery to a common carrier to start the process of exportation."

This is evident from the remaining language of the passage following that quoted by petitioner in *Rich-*

field, 329 U.S. at pages 82-83, 91 L.Ed. at page 93. which reads as follows:

> "Delivery was made into the hold of the vessel from the vendor's tanks located at the dock. That delivery marked commencement of the movement of the oil abroad."

This was true even though ". . . at the time of the delivery the vessel was in California waters and was not bound for its destination until it started to move from the Port." Id.

Rejection by this Court. Indicators of certainty such as proposed by petitioner were soundly rejected by *Empresa Siderurgica, S.A. v. County of Merced,* 337 U.S. 154, at page 157, 93 L.Ed. 1276 at 1280 (1949) with the following language:

> "So in this case it is not enough that on the tax date there was a purpose and a plan to export this property. Nor is it sufficient that in due course that plan was fully executed. Part of the plant that is taxed was dismantled, but had not been delivered to any carrier for export or otherwise started on its journey on the tax date. It might still have been diverted into the domestic market. The fact that any such diversion would entail a breach of contract, that a part of the plant had already started on its export journey, that an export license had been obtained and a letter of credit deposited in this country increases the expectation on the tax date that the exportation of the entire plant would eventuate. But that prospect, no matter how bright, does not start the process of exportation. On the tax date the movement to foreign shores had neither started nor been committed."

Cases. The necessity of physical movement to immunize status is also seen in two commerce clause cases. The first is *Superior Oil Co. v. Mississippi*, 280 U.S. 390, 74 L.Ed. 504 (1930), in which an excise tax upon the distribution of gasoline was upheld on the wharf delivery of that gasoline to a purchaser who delivered it by boat to its own fishing boat customers in Louisiana. The second is *Federal Compress & W. Co. v. McLean*, 291 U.S. 17, 78 L.Ed. 622 (1934), which upheld a license tax on a warehouse on the ground that the cotton while in the warehouse had not yet begun to move in interstate commerce. The Court, 291 U.S. at 21, declared that when "it comes to rest there, its interstate journey, whether by truck or by rail, comes to an end and although in the ordinary course of business the cotton would ultimately reach points outside the state, its journey interstate does not begin and so it does not become exempt from local tax until its shipment to points of destination outside the State."

Physical movement was also decisive in *Eardley Fisheries Company v. City of Seattle*, 50 Wash.2d 109, 314 P.2d 393 (1957), which upheld a business and occupation tax paid by reason of a sale of frozen seafood for export. The Court concluded, 314 P.2d at 396, that certainty of export was not established where at the time the tax accrued, the delivery had been made to local storage depots, and not to carriers destined for abroad.

Meaning of "Commitment". The issue, very narrowly, can be said to turn upon the meaning of the word "commitment" used in expressing the test. Of

the several definitions of "commit" set forth in Webster's New International Dictionary, Second Edition, two are relevant here. One definition is as follows:

> "To give in trust, to put into charge or keeping; entrust; consign; . . ."

The second is:

> ". . . to compromise, expose, or endanger by some decisive act or preliminary step; to pledge, . . ."

Thus the problem is whether the word "commit" is used in the physical movement of the property or merely pledging or obligating oneself to do so in the future.

It is clear from the cases that the term is employed in the sense of physical movement rather than mere obligation to do so. The first relevant use was in *Coe v. Errol, supra,* 29 L.Ed. at page 718, as a part of the following passage:

> "Although intended for exportation, they may never be exported; the owner has a perfect right to change his mind; and until actually put in motion, for some place out of the State, *or committed to the custody of a carrier* for transportation to such place, why may they not be regarded as still remaining a part of general mass of property in that State?"

The sense of this passage clearly indicates that commitment is used in the physical sense.

A. G. Spalding & Bros. v. Edwards, 262 U.S. 66, 69, 67 L.Ed. 865, 867 (1923), a congressional export tax case, concluded that delivery of the goods into

the carrier's hands, the very act that passed the title, committed the goods to the carrier that was to take them across the sea. Delivery into the carrier's hands is physical. It is not a promise or obligation to do so in the future.

The same conclusion is inescapable from *Richfield,* which relied on *Spalding,* where commitment was marked by physical delivery into the hold of the vessel. The physical sense was also used in *Empresa Siderurgica,* which rejected commercial preparation as evidence of such commitment.

The necessity of physical movement is seen also in the following definition of an export employed by this Court in a ship's stores case, *Swan & Finch Co. v. United States,* 190 U.S. 143, 47 L.Ed. 984 (1903) and followed by a number of cases including *Shell Oil Co. v. State Board of Equalization,* 64 C.2d 713, 719, 51 Cal.Rptr. 522, 414 P.2d 820 (1966):

> "Whatever primary meaning be indicated by its derivation, the word 'export' as used in the Constitution and laws of the United States, generally means the transportation of goods from this to a foreign country. 'As the legal notion of emigration is a going abroad with an intention of not returning, so that of exportation is a severance of goods from the mass of things belonging to this country with an intention of uniting them to the mass of things belonging to some foreign country or other.'"

Duality. These cases in requiring physical movement are on firm ground. If a pledge of future movement were to satisfy the export test, the duality of

the test would be destroyed. The test requires both certainty and movement or commitment thereto. A pledge to export in the future is no more than evidence of certainty of export. Adoption of the pledge approach to commitment to movement would abandon the distinction between the two elements of the test. It would also abandon the requirement of transportation of goods to a foreign country as a part of the definition cited in *Shell Oil,* identification with the legal notion of emigration as going abroad, and the idea of severance of goods from the mass of things belonging to this country. It is submitted that employment of the term "commitment" to movement is not employed to destroy the requirement of movement or to transform a carefully phrased dual test into a unitary test.

A word must be said as to state cases relied on by Petitioner. The first is *Montrose Chemical Corp. v. Los Angeles,* 243 C.A.2d 300, 52 Cal.Rptr. 209 (1966), cert. den. 386 U.S. 1004. Although the Court there recited the settled rules, it utterly failed to apply them. In any event it was distinguished by *Hugo Neu Corp. v. County of Los Angeles,* 7 C.A.3d 21, 29, ... Cal.Rptr. ..... (1970), on the basis of illegality of diversion into the domestic market. The product there also involved special export packaging not present in the instant case. *Gough Industries v. State Board of Equalization,* 51 C.2d 746, 336 P.2d 161 (1959), cert. den. 359 U.S. 1011, cited by Petitioner at page 19 of its Petition, is similarly distinguishable. *Von Hamm-Young v. San Francisco,* 29 C.2d

798, 178 P.2d 745 (1947). It was also distinguished by *Hugo Neu II, supra,* 7 C.A.3d at page 26, on the ground of impossibility of delivery to carriers because of special emergency wartime shipping restrictions. In this respect it resembles the dock strike of *Multnomah County v. Dant & Russell, Inc.,* 158 Ore. 350, 75 P.2d 986 (1938). Both *Von Hamm-Young* and *Multnomah* were decided before *Empresa Siderurgica* and its rejection of commercial preparations as ground for immunity.

C. The requirement of physical movement together with certainty as a dual test reflects an established fine balance between Federal and State interests.

The dual test requiring both certainty and physical movement expresses an established fine balance between Federal and State interests. In a commerce clause context, *McGoldrick v. Berwind-White Coal Min. Co.,* 309 U.S. 33, 48, 84 L.Ed. 565, 571 (1940), described the balance as an effort to "reconcile competing constitutional demands, that commerce between the States shall not be unduly impeded by state action and that the power to lay taxes for the support of state government shall not be unduly curtailed."

The Federal interest was expressed in the debates at the Constitutional Convention of 1787 [see 2 Farrand, the Records of the Federal Convention of 1787 (1966) 305 et seq., 359 et seq., 441 et seq., 588 et seq.], has been described in *Cook v. Pennsylvania,* 97 U.S. 566, 574, 24 L.Ed. 1015, 1018 (1878), and is summarized in the following language quoted in *Ameri-*

can Smelting & Refining Co. v. County of Contra Costa, 271 C.A.2d 437, 454, 77 Cal.Rptr. 570 (1969), by quoting from *Youngstown Sheet & Tube Co. v. Bowers,* 358 U.S. 534, 545, 3 L.Ed.2d 490, 498 (1959), as follows:

> "The design of the constitutional immunity was to prevent '[t]he great importing States [from laying] a tax on the non-importing States' to which the imported property is or might ultimately be destined, which would not only discriminate against them, but also 'would necessarily produce countervailing measures on the part of those States whose situation was less favorable to importation.' (*Brown v. Maryland,* supra, (U.S.) (12 Wheat. at 440)."

The principle is also characterized as preventing a tidewater state from burdening users and consumers in the interior States in *American Smelting,* 271 C.A. 2d at 464.

The principle may be characterized as a shield against discriminatory taxation. There is no suggestion and no authority for Petitioner's argument in the name of international trade and balance of payments (Petition, pages 11, 16-17) that immunity may be thrust as a sword for a special privilege for the exporters. Immunity is a poor form of subsidy because it casts the burden of Petitioner's share of the cost of local government on other local taxpayers rather than on the nation as a whole.

In this connection Petitioner complains at page 16 of the havoc the lien date system imposes on exporters

unable to arrange for transportation before lien date. The first answer is that inability to obtain freight cars does not preclude taxation of grain in the taxpayer's own warehouse, *In re Review of Assessment of Personal Property,* 156 Neb. 822, 58 N.W.2d 212, 216 (1953), cert. den. 346 U.S. 896, 98 L.Ed. 397 (1953). A more complete answer is that this is a difficulty which is faced by all business men, whether in export trade or not, and must be balanced by the Legislature against the administrative burden of averaging systems of taxation. It would be most discriminatory to solve this difficult problem for exporters only by extending the privilege of export immunity.

The competing state interest, which is described as the demand of the State's power to tax property within its borders, *Youngstown, supra,* 358 U.S. at 545, has been met by upholding taxes designed to make interstate commerce bear a fair share of the cost of local government from which it receives benefits, *McGoldrick v. Berwind-White Coal Min. Co., supra.* In the case of the Export-Import clause, although the effect of export status is still held to be absolute tax immunity *(Richfield, supra)* an accommodation is manifest in an ever-narrowing definition of export-import status. Perhaps the most dramatic restriction in the scope of immunity status is found in property tax upon imported materials, a portion of which remained in their original packages, held for use in the manufacturing process. The then most recent decision of this Court held that until sale or bulk broken immunity extends to retention for use

as well as retention for sale. *Hooven & Allison Co. v. Evatt,* 324 U.S. 652, 89 L.Ed. 1252 (1945). In marked contrast thereto *Youngstown* held that so much of the materials inventory even in original packages retained for current operational needs was free from the immunity. This contrast was characterized by Mr. Justice Frankfurter in his dissent 358 U.S. at page 570, as an effective reversal of *Hooven & Allison.*

The magnitude of this restrictive shift in approach to immunity is demonstrated by *Virtue Bros. v. County of Los Angeles,* 239 C.A.2d 220, 48 Cal.Rptr. 505 (1966), cert. den 385 U.S. 820, 17 L.Ed.2d 58, which found the entire inventory to be required for operational needs. *American Smelting, supra,* reviewed the foregoing history and also upheld taxation of an entire inventory held for refining.

The same policy is manifest in *Volkswagen Pacific, Inc. v. City of Los Angeles,* 12 C.A.3d 689, 90 Cal. Rptr. 902 (1970), in which the California Supreme Court granted hearing and ordered transfer to the Court of Appeal for reconsideration upon another issue. The immunizing force of the original package doctrine was minimized by characterizing the sea van used as a part of a containerized system of transportation as the original package rather than the packages therein containing supplies of auto parts. The magnitude of the restriction is seen in the comparison of a huge sea van with the bales and packing boxes as were involved in the case cited therein as authority. The restrictive approach is also seen in

considering an entire shipment of automobiles as constituting the original package. Thus, the sale of one automobile or one packing box from the dock rendered the entire sea van and the entire shipment of automobiles subject to taxation. The restrictive policy is also seen in *Volkswagen Pacific* in employment of the device of an importer in the constitutional sense, which had earlier been employed to preserve immunity by *Hooven & Allison, supra,* to destroy immunity even though the contract in question was between a foreign manufacturer and its wholly owned subsidiary.

The restrictive approach is also seen in the export application of the constitutional provision in *Shell Oil Co. v. State Board of Equalization,* 64 C.2d 713, 722, 51 Cal.Rptr. 524, 414 P.2d 820 (1966), which employed Commerce Clause considerations which uphold taxes designed to make interstate commerce bear a fair share of the cost of local government in part to refuse to extend the scope of export immunity to ship's stores.

These cases demonstrate the fine balance between Federal and State interests that is manifest in the decision of the Court of Appeal below.

Taken together, these cases in their results reflect the constitutional demand that the power to lay taxes for the support of state government shall not be unduly curtailed. Indeed, the present case involving the property tax is an appropriate one for similar treatment. This is particularly true of a property tax because it does not discriminate against the taxpayer

or impose upon him an undue burden, but rather immunity from it confers upon him a special privilege. This approach is reflected in *Virtue Bros. v. County of Los Angeles,* 239 C.A.2d 220, 231, 48 Cal. Rptr. 505 (1966) as follows:

> "The property tax upon them was nondiscriminatory; they were not singled out because they were imported, nor was the tax even remotely connected with the activity of importation. Had the materials been of domestic origin, they would have been fully taxable under the assessment now in dispute. By enforcing this tax, California is no way taking undue advantage of its position, as an importing state to the detriment of inland states. 'We cannot impute to the Framers of the Constitution a purpose to make such a discrimination in favor of materials imported from other countries as would result if we approved the views expressed upon us by the manufacturers.' (*Youngstown Sheet & Tube Co. v. Bowers,* supra, at page 550)".

D. There was neither certainty nor export movement of petioner's rice.

In this case there was neither certainty nor commitment to movement. Four reasons negate the element of certainty.

The first is the contract provision for a variance of 10% more or less in the quantity sold. (C.T. 19: 14-17.) This means that the range of variation may be as much as 1/5th of the whole contract amount. Since a ship can be filled more quickly than rice can be brought to the dock, the maximum quantity must always be available dockside; however, only a smaller

quantity will actually be delivered to the ship. This is the situation of Category (2) rice which was left over at the Port from an earlier shipment.

The second reason showing the absence of certainty concerns the paddy rice of Category (6). Inasmuch as on lien date it had not been milled, respondent was still free to change the extent of milling so as to tailor it to the most advantageous market.

The third reason is that on lien date the rice had not been loaded on a ship, and petitioner still has not received the negotiable bills of lading by which it obtains payment of the purchase price. In short, the rice is still under petitioner's control and petitioner is free to complete the transaction or to refuse to do so, as it might very well do, if for any reason the foreign purchaser's credit arrangements failed before the rice is loaded into the vessel.

The fourth reason involves the fungible nature of rice as a commodity. Until the rice is delivered aboard the vessel, petitioner is free to deliver either the taxed rice or to satisfy the export obligation from identical rice from other sources.

Turning from certainty to movement, there was no export movement of petitioner's rice. Neither the unmilled paddy rice of Category (6) which had not yet moved through the manufacturing process nor the just milled rice of Categories (5) and (4) in storage at petitioner's mill had achieved immunity. *Turpin v. Burgess,* 117 U.S. 504, 29 L.Ed. 988 (1886); *Cornell v. Coyne,* 192 U.S. 418, 48 L.Ed. 504 (1904) and *Heisler v. Thomas Colliery Co.,* 260 U.S. 245, 67

L.Ed. 237 (1922). This result is not changed by the existence of sales contracts. *Cornell v. Coyne, supra, Empresa Siderurgica, S.A., supra,* and *American Smelting, supra.* Category (2) rice was immune also. It was in storage at the Port as a leftover from an earlier shipment, but had undergone no movement referable to the contract by which it was actually exported. *Hugo Neu Corp. v. County of Los Angeles,* 241 C.A.2d 703, 50 Cal.Rptr. 916 (1966). Categories (1) and (3) were awaiting delivery to export vessels. But for a crucial distinguishing factor which petitioner fails to note in its list of similarities on page 18 of its Petition, the situation resembles that in *Richfield,* where the oil had been carried by pipeline from Richfield's refinery in California to storage tanks at the harbor. The crucial distinguishing factor in the instant case is that the rice had not yet been delivered to the export vessel, which delivery to the export vessel *Richfield* declared marked the commencement of the export journey. It is clear that none of petitioner's rice had attained export status as of lien date.

E. Puerto Rican trade is not export trade.

The Court of Appeal below in its Opinion, Appendix pp. xi-xiii, correctly concluded that Puerto Rico is not a foreign country but a commonwealth of the United States. The Opinion refers to the congressional statute, 48 U.S.C.A., §§731(b) through 731(e), which appears to confer greater autonomy than a territory but less than a state. The Opinion continues to point out federal statutes which define it as both a state and a territory for particular purposes.

Resolution of the state-territory issue [See *American Ins. of Puerto Rico, Inc. v. Kaplus*, 368 P.2d 431 (1962)] is not necessary here, it is only sufficient to demonstrate that Puerto Rico is no more a foreign country now than it was at the time of *Dooley v. United States*, 182 U.S. 222, 234, 45 L.Ed. 1074, 1082 (1901). Goods sent between Puerto Rico and California are no more exports or imports now than when this Court decided *Dooley*.

Petitioner at pages 26 and 27 misstates the action of the Court below in asserting that it characterized Puerto Rico as a state for purposes of the export immunity clause. This is not the case and is immediately apparent from a reading of the Opinion of the Court of Appeal.

The cases cited by petitioner support the characterization made by the Court below. None of the three cases holds Puerto Rico to be a foreign country. None holds trade with Puerto Rico to be export trade.

Although *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 27 L.Ed.2d 174 (1970), concluded Puerto Rico was not a state within the meaning of the appeal provisions of 28 U.S.C.A. (1254(2), this Court concluded it could take jurisdiction over the cause by considering the appeal to be a petition for certiorari. *Cosentino v. I.L.A.*, 126 F.Supp. 420 (D. Puerto Rico 1954) indicated satisfaction that the whole body of federal laws that apply in the same constitutional way as they do in a State continue to apply to Puerto Rico upon attainment of commonwealth status wherever they have been previously applicable. Both conclusions are utterly inconsistent with export trade to a foreign nation.

Finally *Alcoa Steamship Co. v. Perez,* 295 F.Supp. 187, 197 (D. Puerto Rico 1968), concluded that Puerto Rico was not an independent republic.

II

THERE IS NO PROBABILITY THAT THE QUESTIONS DECIDED BELOW WERE NOT DECIDED IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT.

The rules of law relied on below and which support the decision below are based upon the applicable decisions of this Court; so there is no probability that action below is not in accord with decisions of this Court. This is apparent from a brief summary of the rules and decision.

The basic rule is that immunity attaches when goods are shipped, entered for shipment with a common carrier for transportation out of state or have been started upon such transportation. *Coe v. Errol, supra, Richfield, supra, Empresa Siderurgica, supra.* Intention to export is not enough. *Coe, supra, Diamond Match v. Ontonagon,* 188 U.S. 82, 47 L.Ed. 397 (1903), *Empresa Siderurgica, supra,* and actual subsequent export is not determinative. *Joy Oil Co. v. State Tax Commission,* 337 U.S. 286, 93 L.Ed. 1366 (1949). Manufacturing goods or processing to fill an export order, even to consignee's specifications, does not constitute the goods an export before the final uninterrupted journey commences. *Turpin v. Burgess,* 117 U.S. 504, 29 L.Ed. 988 (1886), *Cornell v. Coyne,* 192 U.S. 418, 429, 48 L.Ed. 504 (1904), *Heisler v.*

Thomas Colliery Co., 260 U.S. 245, 67 L.Ed. 237 (1922). Contrary to petitioner's assertion at page 15 of its Petition, internal preparatory movement is distinguished from the final journey abroad. *Coe v. Errol, supra.* Delivery into the hold of the purchaser's vessel or to the carrier marks commencement of movement abroad. *Spalding, supra, Richfield, supra, Empresa Siderurgica, supra, Ontonagon, supra.* Immunity does not extend to gasoline delivered on the wharf, *Superior Oil v. Mississippi*, 280 U.S. 290, 74 L.Ed. 504 (1930), nor to property in storage awaiting delivery. *Federal Compress & W. Co. v. McLean*, 291 U.S. 17, 78 L.Ed. 622 (1934), *American Smelting & Refining Co. v. County of Contra Costa*, 271 C.A.2d 437 (1969), app. dism. 396 U.S. 273, 24 L.Ed.2d 462 (1970). Commercial preparation tending to show a certainty that the goods are presently for exportation was soundly rejected by *Empresa Siderurgica.*

Fine balance of underlying federal and state interests represented by these rules is also based on decisions of this Court. *McGoldrick v. Berwind-White Coal Co., supra, Youngstown, supra.* Consistent also was action of this Court in denying certiorari in *Virtue Bros., supra,* and in dismissing the appeal in *American Smelting, supra.* Characterization of the federal interest as protection against discriminatory taxation rests on longstanding decisions of this Court, *Brown v. Maryland* (U.S.) 12 Wheat. 419, 440, 6 L.Ed. 678 (1827), *Woodruff v. Parham*, 8 Wall. 123, 19 L.Ed. 382 (1869), and *Cook v. Pennsylvania*, and there is no authority for characterizing the federal

interest as subsidization of foreign trade or protection for balance of payments as urged by petitioner.

III

THERE IS NO INCONSISTENCY BETWEEN THE DECISION BELOW AND OTHER STATE DECISIONS SO AS TO NECESSITATE GRANTING OF A WRIT OF CERTIORARI.

The decision below rests upon a firm foundation of state decisions carrying out settled rules. These settled rules were announced by this Court; so there is no need for further action by this Court. This is apparent from the state decisions and decisions of this Court cited herein.

The absence of necessity for further action by this Court is apparent from petitioner's own argument. The three state decisions cited at page 25 of the petition all precede *Richfield* and *Empresa Siderurgica.* They also precede the fine balancing of federal and state interests of *McGoldrick* and *Youngstown.* One of the cases, *Blount v. Munroe,* 60 Ga. 61 (1878), even precedes *Coe v. Errol, supra,* the earliest case decided by this Court as to when goods attained immune status. The Minnesota Court in *State v. Hammermill Paper Co.,* 149 Minn. 414, 184 N.W. 182 (1921), the second case cited by petitioner, ignored its own contrary decision, *State v. Burlington Lumber Co.,* 118 Minn. 329, 136 N.W. 1033 (1912). In *Multnomah County v. Dant & Russell, Inc.,* 158 Ore. 350, 75 P.2d 986 (1938), the delay in shipment resulted from a shipping strike which is not the case here. It is clear

that petitioner has demonstrated no such inconsistency of state decision as to require further review by this Court.

CONCLUSION

For the reasons set forth herein, the petition for a writ of certiorari should be denied.

Dated: October 6, 1971.

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